

(2012) 08 MAD CK 0072

In the Madras High Court

Case No : C.R.P. (PD) (MD) . No. 1597 of 2012 and M.P. (MD) No. 1 of 2012

A.V. Meeran Mydeen

APPELLANT

Vs

A. Shahul Hameed and others

RESPONDENT

Date of Decision : 16-08-2012

Acts Referred:

Citation : (2012) 4 LW 738

Hon'ble Judges : S. Palanivelu, J

Bench : Single Bench

Advocate : G. Prabhu Rajadurai, for the Appellant; K.P. Narayana Kumar, for the Respondent

Final Decision : Dismissed

Judgement

S. Palanivelu, J.—The respondents have filed a suit in OS. No. 637 of 2009 on the file of the Principal District Munsif, Nagercoil, for the following reliefs:

(a) A decree be given declaring that the plaintiffs are the members of the first defendant Jamaath, entitled to all the benefits, rights guaranteed under its bye-law and the subsequent resolutions and decisions of the general body and executive committee of the first defendant Jamaath.

(b) An injunction be granted restraining the defendants, other office bearers, their men and persons claiming under them from interfering in availing the services of lebbais, modiers, and other in the functions held in the plaintiffs house and from interfering in the rights and privileges of the plaintiffs as members of the trust.

Inter alia, it is pleaded in the plaint that the first plaintiff is the father of 2 to 5 plaintiffs. They are members in the Mahan Tulkasha Olliyullah Darga Vadaseri Kuthba Pallivasal, Vadaseri, Nagerciol. There had been some bad blood existed between the plaintiffs and the first defendant who was the President of the above said Darga and due to his instigation, a resolution was passed touching the marriage celebrated by the first plaintiff with the second wife who is the sister of

the first wife stating that it is against the Muslim Law. The resolution was passed only because of the strained relationship between the first plaintiff and first defendant. By means of resolution the first plaintiff was exterminated from the activities of the Jamaath. Hence, he filed a suit in O.S. No. 215 of 1997 on the file of the Principal Munsif Court, Nagercoil. Thereafter, there was a compromise between both parties and the said extermination was recalled by the Jamaath. To this effect, on 10.05.2006, a resolution was passed in the following terms:

2. In view of the above said resolution, the Jamaath continued to collect Chantha or Vari from the plaintiffs and they continued to be members of the Jamaath. The extermination was also termed to be violation of human rights. By means of production of receipts, it is seen that the Jamaath collected Chantha or subscription from the plaintiffs. On 18.05.2007 the first plaintiff paid a sum of Rs. 1,00,000/- for construction of Manara i.e. a dome for the Jamaath building. The plaintiffs have produced as many as six such receipts to show that money was collected from them by the Jamaath.

3. Pending the trial of the case, the plaintiffs filed an application in I.A. No. 606 of 2012 requesting the Court to direct the third defendant to issue No Objection Certificate for the marriage of the daughter of the first plaintiff by name S. Bowski with one B. Mohamed Hussain of Chennai. The marriage is scheduled to be celebrated in August, 2012. The petition was filed on 09.02.2012. In the affidavit, the petitioners have mentioned about the extermination and the recalling of the same by subsequent resolution by the Jamaath on assuming charge of the third respondent as the President of the Jamaath. It is also alleged that on his assumption as President of the Jamaath, he regularised the membership and properly managing and administering the affairs of the Jamaath and the membership of the plaintiffs were also regularised and subscription was also collected from them as resolved in the above said resolution. It is the practice among the muslim community to get No Objection Certificate from the Jamaath where the father of the spouse is member and now the No Objection Certificate is very much essential for the conduct of the marriage of the daughter of the first plaintiff.

4. The third defendant filed a counter objecting the grant of No Objection Certificate to the first plaintiff. He pleads ignorance of the alleged enmity between the first plaintiff and the first defendant. It is also stated in the counter that the plaintiffs have filed a suit without approaching the Jamaath in proper manner.

5. After hearing both sides, the learned Principal District Munsif, Nagercoil, found it appropriate to direct the third defendant to issue No Objection Certificate and allowed the application directing him as such. Hence, the third defendant is before this Court with this revision.

6. Point for consideration:

Whether there can be a direction by this Court to the third defendant to issue No

Objection Certificate as prayed by the plaintiffs in the suit?

Point:

The first plaintiff married sisters, of course, on two different occasions. The first wife being elder sister has got five children and the second wife, the younger sister, has got two daughters, among whom the elder one is going to get married presently. It is the bottom line contention of Mr. G. Prabhu Rajadurai, learned Counsel appearing for the petitioner that the marriage of the first plaintiff with the younger sister of his first wife during the subsistence of the marriage with the elder sister comes within the definition of "unlawful conjunction" as mentioned in Mahomedan Law, that as per the Mahomedan Personal Law, the second marriage of the younger sister of first wife, during her life time, is unlawful and no right would flow from such wedlock to the first wife and the children born to the second wife through the first plaintiff and hence, the children have to be treated as illegitimate and for such children, the Jamaath could not issue No Objection Certificate since it is defying the principles of Mahomedan Law, that the petitioners Jamaath can issue No Objection Certificate for conduct of marriage in any other Jamaath, that the Tamil Nadu Government Chief Quazi for Kanyakumari District has issued an expert opinion stating that the marriage conducted by the first plaintiff with the younger sister of his first wife is not lawful and no certificate as required by the plaintiff could be issued, that in the Nikah at the time of observing Valli, the first plaintiff could not participate since he had acted in violation of Mahomedan Personal Law and that the relationship which the first plaintiff with his second wife would amount to fornication.

7. Contending on the other side of the coin, Mr. K.P. Narayana Kumar, learned Counsel appearing for the respondents would contend that it is true that there is a prohibition in the Mahomedan Law that a male is barred from contacting marriage of younger sister of the first wife and such marriage cannot be termed to be batil viz., void marriage and at the most, it could be meant to mean a fasid i.e. irregular marriage and the same could be cured by the subsequent conduct of the parties, that the Personal Law of Mahomedan did not enlist batil as a one which would be a void marriage, that by no stretch of imagination, it could be stated that the children born out of batil are illegitimate children, that the marriage of the daughter of the first plaintiff is scheduled to be held on 23.08.2012 and for observance of necessary rituals as mandated by Mahomedan Law to be performed by Quazi or Muthavalli, the No Objection Certificate is very much required and there can be no legal embargo for the third defendant to issue such a certificate that the qualified, well accepted and settled principles would vividly and unambiguously indicate that even if the children born to the second wife of a male who is the sister of first wife are legitimate in case if the second marriage was consummated and that there is no ground to disturb the conclusion recorded by the Court below.

8. On the petitioner's side, the opinion of the Tamil Nadu Government Chief Quazi for Kanyakumari District has been produced. In which, he has stated as

follows:

9. The Court has to be extra cautious since the issue to be decided and answered pertains to a sensitive subject touching Personal Law. Paragraphs 263, 264, 266 and 267 of the Mulla's Principles of Mahomedan Law, 19th Edition, are more pertinent. Paragraph 263 explains "unlawful conjunction". It prohibits marrying two sisters, of course, nothing would prevent a man from marrying his wife's sister after the death or divorce of the first wife.

10. Paragraph 266 contemplates effects of a void (batil) marriage and paragraph 267 is enlisting effects of a fasid marriage.

11. The issue was raised before the Hon'ble Supreme Court and the Apex Court had an occasion to go deep into the above said provisions as regards the void and irregular marriages and the said terms have been elaborately interpreted and explained by the Hon'ble Supreme Court in a decision reported in Chand Patel Vs. Bismillah Begum and Another, , Their Lordships have discussed about the entitlement of the second wife who is the sister of the first wife of her husband and her daughter. The Supreme Court concluded that the marriage is only irregular and not void and hence, the second wife and daughter born to her are legitimate wife and daughter and they are entitled to get maintenance u/s 125 of the Code of Criminal Procedure. The Supreme Court defines the terms "unlawful conjunction" as that of a man could not marry his wife's sister in his wife's life time. The Court was called upon to answer the legal status of the union between the male and the second wife in the life time of the first wife. The following are the operative portions in the decision of the Supreme Court containing the relevant paragraphs in the Principles of Mahomedan Law:

21. Under the Muslim law also a distinction has been drawn between void marriages and irregular marriages. The same has been dealt with in Mulla's "Principles of Mahomedan Law" in paragraphs 260 to 264. Paragraphs 260, 261 and 262 deal with complete prohibition of marriage between a man and the persons included therein and any marriage in violation of such provision would be void from its very inception (batil). Paragraph 263 which is relevant for our purpose reads as follows:-

263. Unlawful conjunction A man may not have at the same time two wives who are so related to each other by consanguinity, affinity and fosterage, that if either of them had been a male, they could not have lawfully intermarried, as for instance, two sisters, or aunt and niece. The bar of unlawful conjunction renders a marriage irregular, not void."

25. Paragraph 264 which deals with the distinction between void and irregular marriages reads as follows:-

264. Distinction between void and irregular marriages

(1) A marriage which is not valid may be either void or irregular.

(2) A void marriage is one which is unlawful in itself the prohibition against the marriage being perpetual and absolute. Thus a marriage with a woman prohibited by reason of consanguinity, affinity, or fosterage is void, the prohibition against marriage with such a woman being perpetual and absolute.

(3) An irregular marriage is one which is not unlawful in itself, but unlawful "for something else," as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses. Thus the following marriages are irregular, namely

- (a) a marriage contracted without witness;
- (b) a marriage with a fifth wife by a person having four wives;
- (c) a marriage with a woman undergoing iddat;
- (d) a marriage prohibited by reason of difference of religion;
- (e) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried.

The reason why the aforesaid marriages are irregular, and not void, is that in cl. (a) the irregularity arises from a accidental circumstance; in cl. (b) the objection may be removed by the man divorcing one of his four wives; in cl.(c) the impediment ceases on the expiration of the period iddat; in cl.(d) the objection may be removed by the wife becoming a convert to the Mussalman, Christian or Jewish religion, or the husband adopting the Moslem faith; and in cl(e) the objection may be removed by the man divorcing the wife who constitutes the obstacle; thus if a man who has already married one sister marries another, he may divorce the first, and make the second lawful to himself.

26. Paragraph 266 deals with the effects of a void (batil) marriage and provides that a void marriage is no marriage at all. It does not create any civil rights or obligations between the parties. The offspring of a void marriage are illegitimate. Paragraph 267 which deals with the effects of irregular (fasid) marriages reads as follows:-

267. Effect of an irregular

(fasid) marriage

(1) An irregular marriage may be terminated by either party, either before or after consummation, by words showing an intention to separate, as where either party says to the other "I have relinquished you". An irregular marriage has no legal effect before consummation.

(2) If consummation has taken place

- (i) the wife is entitled to dower, proper or specified, whichever is less;
- (ii) she is bound to observe the iddat, but the duration of the iddat both on

divorce and death is three courses;

(iii) the issue of the marriage is legitimate. But an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife (Baillie, 694, 701).

12. In the above said decision, the Supreme Court has referred to an earlier decision of the Bombay High Court and approved the observations rendered by the Bombay High Court. The relevant portion with extraction of decision in the Apex Court is hereunder:

23. The said decision subsequently came to be considered by the Bombay High Court in the case of *Tajbi Abalal Desai vs. Mowla Alikhan Desai* (39 Indian Cases 1917 603) and was decided on 6th February, 1917. The Bombay High Court differed with the decision rendered in *Aizunnissa v. Karimunissa*, ILR 1895 (23) Cal. 130, and placing reliance on the views expressed in *Fatawa-i-Alamgiri* held that a marriage with the sister of an existing wife was not void (batil) but irregular (fasid). The reasoning adopted was that marriage with a permanently prohibited woman had always been considered by the exponents of Muslim law to be void and has no legal consequence, but marriage with a temporarily prohibited woman if consummated may have legal consequences.

The logic behind the aforesaid reasoning was that a marriage with the sister of an existing wife could always become lawful by the death of the first wife or by the husband divorcing his earlier wife and thereby making the marriage with the second sister lawful to himself. The Bombay High Court after considering various authorities, and in particular *Fatawa-i-Alamgiri*, ultimately observed as follows:-

Taking the whole current of authority and the general trend of informed thought on this subject, it points clearly to some such distinctions having always been recognized by the Muhammadan Law. Where that is so and a particular case on the borderland of such distinctions, to which it may be doubtful whether they can be applied in the ordinary way, arises, surely the Courts would be well advised to accept the authoritative statement of the law as it was then understood by the authors of the *Fatawa-i-Alamgiri*. It is impossible to say that that statement conflicts with the textual authority of the Kuran. Speaking generally, it appears to us to harmonize with the course the law took during the intervening period, and to be in consonance with the soundest practical principles. It has the support of such a great modern text-book writer as Baillie. The eighth chapter of his first book appears to us to reach conclusions by unanswerable reasoning, and while those conclusions may be his own, they are the conclusions of a writer of profound knowledge intimately versed at first hand with all the best writings of Muhammadan lawyers. The modern Muhammadan tex-book writers, Ameer Ali, Tyabji and Abdur Rahim, are in substantial agreement. All authority appears to us to point one way. Against this is nothing but the judgment of the Calcutta High Court in *Aizunnissa's* case and after having given it and the materials upon which it avowedly rests our most careful and respectful attention, we find

ourselves wholly unconvinced by its reasoning and unable to agree with me law it lays down.

13. Eventually, the Supreme Court has held that unlawful conjunction or marriage between the appellant and the respondent 1 continues to subsist not having been declared void by any competent forum and that accordingly the respondent 1 (second wife), respondent 2 (her daughter) will both be entitled to maintenance u/s 125 of the Code of Criminal Procedure.

14. It is the view expressed by the Supreme Court that unless the marriage is declared to be void by a competent Court of law, the second wife and their offspring are legitimate in case if the marriage was consummated as provided in paragraph 267 (2) (iii), which goes to say that in an irregular (fasid) marriage, if consummation has taken place, the issue of the marriage is legitimate. The above said decision of the Supreme Court has been referred and followed by a Division Bench of this Court in 2008 (3) CTC 785 = 2008-3-L.W. 401 (H. Anwar Basha v. The Registrar General, Madras High Court and another), wherein after extracting the relevant portion of the judgment, it is observed that though the marriage is said to be irregular the children born out of such marriage would not be disentitled to claim the benefits of the parents.

15. Concededly, there has been no legal proceedings for declaring the marriage between the first plaintiff and his second wife as void before any competent forum. After recalling the extermination, by a resolution the Jamaath has continued to collect subscription from the plaintiffs and they have been treated as lawful members of the Jamaath. In this context, the learned Counsel for the respondents would submit that in view of the collection of subscription, the revision petitioner is estopped from refusing to issue No Objection Certificate. His contention has considered force.

16. The issue was also taken up by other High Courts which are very much available in the decision in Chand Patel's case cited supra. The point is also in another judgment of Kerala High Court in 1985 CrL. L.J. 1996 (Amina v. Hassan Koye). In an unreported judgment of Andhra Pradesh High Court in C.R.P. No. 3979 of 2009 (Shaik Tara Begum and others v. Shaik Sartaj Begum and others) decided on 01.06.2010, it is observed as follows:

Unlawful conjunction:- A man may not have at the same time, two wives who are so related to each other by consanguinity, affinity or fosterage, that if either of them had been a male, they could not have lawfully intermarried, as for instance, two sisters, or aunt and niece. The bar of unlawful conjunction renders a marriage irregular, not void.

From this, it is clear that, in case a man professing Islam, marries two women, who are sisters, such marriage is only irregular and not void. In Section 267, it is stated that irregular marriage can be terminated by either party, as in the case of a voidable contract. No such development has taken place between late Shaik Anwar Basha and the 1st petitioner, nor did the 1st respondent challenge the

said marriage. The sequence of events, on the other hand, disclose that she has acquiesced in the said marriage. She cannot assail the validity of such marriage, particularly, after the death of their common male spouse."

17. It is also observed therein that it is clear that in case a man is prohibited from marrying two women/sisters, such marriage is irregular and not void.

18. The circumstances of this case would indicate that the Jamaath had very well known about the second marriage of the first plaintiff with the sister of the first wife and it has acquiesced with the said marriage and the Jamaath had also been collecting membership Chandha from the plaintiffs. In the light of the above on the strength of the Principles of Mahommedan Law as well as the guidelines and ratio laid down by the Supreme Court, this Court is of the firm view that since the marriage of the first plaintiff with the second wife was consummated, even though it is an irregular marriage, the offspring born out of the said marriage are legitimate and hence, there is no legal impediment and settled principles of Mahomedan Personal Law pave way for the third defendant to issue No Objection Certificate as required by the first plaintiff. In such view of this matter, there is no valid ground made out to dislodge the conclusion arrived at by the Trial Court and the order challenged before this Court deserves to be confirmed and it is confirmed. The Civil Revision Petition suffers dismissal.

In fine, the Civil Revision Petition is dismissed directing the third defendant to issue No Objection Certificate on or before 19.08.2012 to the first plaintiff. Consequently, connected miscellaneous petition is closed. No costs.